

STATE OF MICHIGAN  
IN THE SUPREME COURT

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KENNETH GREER, individually and  
as Conservator for MAKENZIE GREER,  
a Minor and ELIZABETH GREER,

MSC Docket No: 149494

Plaintiffs/Appellees/Cross-Appellants,

COA Docket No: 312655

v

ADVANTAGE HEALTH and  
ANITA R. AVERY MD, jointly and severally,

Kent County Circuit Court  
Case No: 10-09033-NH

Defendants-Appellants/Cross-Appellees

and

TRINITY HEALTH MICHIGAN, d/b/a  
ST. MARY'S HOSPITAL and KRISTINA  
MIXER, MD,

Defendants.

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**BRIEF ON APPEAL OF CROSS-APPELLEES**  
**ADVANTAGE HEALTH AND ANITA R. AVERY MD**

**ORAL ARGUMENT REQUESTED**

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**COUNTER-STATEMENT OF QUESTION PRESENTED**

DID THE COURT OF APPEALS ERR IN RULING THAT THE \$600,000 SETTLEMENT BETWEEN PLAINTIFFS/CROSS-APPELLANTS AND ANOTHER JOINTLY AND SEVERALLY LIABLE DEFENDANT SHOULD BE SET OFF FROM THE DAMAGES AWARDED AGAINST DEFENDANTS/CROSS-APPELLES?

Plaintiffs/Cross-Appellants say:      Yes

Defendants/Cross-Appellees say:      No

The Court of Appeals said:              No

**COUNTER-STATEMENT OF JURISDICTION**

Defendants/Cross-Appellees adopt as accurate the Statement of Jurisdiction of Plaintiffs/Cross-Appellants.

## **COUNTER-STATEMENT OF FACTS AND PROCEEDINGS**

### **A. Introduction**

Plaintiffs/Cross-Appellants are Kenneth Greer ("Mr. Greer"), individually and as Conservator for his minor daughter, Mackenzie Greer ("Makenzie"), and Makenzie's mother, Elizabeth Greer ("Mrs. Greer")(collectively "the Greers"). The Greers filed a one count complaint against four defendants on September 7, 2010 (App 1a-16a). The four defendants were Anita R. Avery MD and her employer, Advantage Health (collectively "Dr. Avery"), Trinity Health Michigan, d/b/a St. Mary's Hospital ("St. Mary's"), and Kristina Mixer MD. The claim against Kristina Mixer MD was dismissed on November 30, 2010 (Docket No. 189). References to docket numbers in this Brief relate to the corresponding docket numbers in the trial court's register of actions (pp. 1b-13b of Cross-Appellees' Supplemental Appendix). References to the Appendix of Appellants/Cross-Appellees (previously filed) in this Brief relate to the relevant page numbers in the Appendix, abbreviated App#. References to the Supplemental Appendix of Cross-Appellees are abbreviated SA with the correspondence page number.

Prior to trial, the Greers settled their claims against St. Mary's for \$600,000 (App 17a – 19a). The case proceeded to trial against Dr. Avery. The jury awarded damages against Dr. Avery which were reduced to a judgment on September 14, 2012.

Dr. Avery timely filed a Claim of Appeal to the Michigan Court of Appeals which presented two issues. First, it was the contention of Dr. Avery that the entire amount of the \$600,000 settlement between the Greers and St. Mary's should offset the judgment entered against Dr. Avery. The Court of Appeals, in its written Opinion of May 13, 2014, agreed that the

\$600,000 settlement should be offset against the judgment in its entirety. It is this ruling by the Court of Appeals which is the subject of the Greers' Cross-Appeal.

The second issue presented by Dr. Avery's appeal to the Court of Appeals was that the award of past medical expenses included within the judgment should be reduced from the amount billed for medical expenses to the amount actually paid. That issue is before this Court on Dr. Avery's Appeal as Appellant.

**B. Factual Background**

The Greers filed a one count complaint against Dr. Avery and St. Mary's, jointly and severally. The claims of negligence were precisely the same against Dr. Avery and St. Mary's and appear at paragraph 34 of Plaintiffs' complaint. Likewise, the Greers' claims for damages were precisely the same against Dr. Avery and St. Mary's. Generally, the complaint alleged negligence in the performance of an external cephalic version on September 27, 2008, negligence in monitoring Mrs. Greer's labor on September 27 and September 28, 2008, negligence in not performing a Caesarean section prior to the time that Mrs. Greer's uterus ruptured at about 6:30 p.m. on September 28, 2008, negligence in not timely performing a Caesarean section after the uterine rupture, and negligence in the performance of the Caesarean section resulting in an injury to Mrs. Greer's ureter. (App 1a-16a).

**C. Procedural History**

Prior to trial, the Greers settled their claims against St. Mary's for \$600,000. A release and settlement agreement was signed on March 14, 2012. (App 17a). An order approving the settlement was entered on March 27, 2012 where the trial court determined that the settlement "is in the best interest of Makenzie Greer, a minor." (App 20a). Dr. Avery was not given notice of

the hearing on the motion to approve the settlement which took place on March 27, 2012. (Docket No. 72). The settlement was confidential. (App 17a).

With the claims against St. Mary's having been settled for \$600,000, the case proceeded to jury trial against Dr. Avery on April 17, 2012. The jury returned its verdict on April 27, 2012. The jury awarded no money to Mr. and Mrs. Greer but awarded Makenzie damages for past economic loss and future economic and non-economic loss. (App 17a). Prior to the entry of judgment, on May 9, 2012, Dr. Avery moved for reduction in judgment seeking to have the court reduce the award of future economic and non-economic damages to present value pursuant to MCL 600.6303 and, among other things, seeking to offset from the judgment the entire amount of the \$600,000 settlement between the Greers and St. Mary's. (Docket No. 33). A hearing on this motion was held on June 7, 2012. (Docket No. 27). At the hearing, Dr. Avery presented the trial court with a booklet entitled "Summary of Argument Regarding Defendants' Motion for Reduction in Judgment." (Docket No. 3).

Prior to the June 7, 2012 hearing on Dr. Avery's motion for reduction in judgment, Dr. Avery issued subpoenas to both the Greers and St. Mary's requesting that they produce at the hearing:

Any and all documents, releases, payment records, covenants not to sue, settlement agreements or other documents reflecting any settlement between [the Greers] and [St. Mary's] in connection with Kent County Circuit Court Civil Action No. 10-09033-NH. (SA 20b – 23b).

The Greers failed to produce anything in response to this subpoena. They did not produce the "Confidential Exhibit A" referenced repeatedly in their Appeal Brief. The Confidential Exhibit A was never part of the record in the trial court or in the Court of Appeals, and is not part of the

record even today before this Court. In response to the subpoena St. Mary's produced the only settlement agreement between the Greers and St. Mary's, contained in its entirety in App 17a-19a.

On August 8, 2012 the trial court entered its opinion and order regarding Dr. Avery's post-trial motions. The court entered an order reducing future damages to present value and granting Dr. Avery a setoff not in the amount of \$600,000, but in the amount of \$162,058.11. The trial court also found that the Greers were entitled to taxable costs as the prevailing parties under MCR 2.625.

On August 28, 2012 Dr. Avery filed a motion for reconsideration (Docket No. 15) which was denied by the trial court in an opinion and order issued on September 12, 2012. (Docket No. 8). On September 14, 2012 the court entered judgment against Dr. Avery in the amount of \$1,058,865.56 (Docket No. 7). The court also entered an order awarding the Greers their costs as prevailing parties in the amount of \$32,393.80. (Docket No. 6). The court denied costs to Dr. Avery. (Docket No. 1).

Following Dr. Avery's appeal, the Michigan Court of Appeals issued its published opinion on May 13, 2014, *Greer v Advantage Health*, 305 Mich App 192; 852 NW2d 198 (2014). The Court of Appeals ruled that the trial court erred in failing to offset from the judgment entered against Dr. Avery the entire amount of the \$600,000 settlement between the Greers and St. Mary's. The Greers have appealed as Cross-Appellants.

## ARGUMENT

### **I. DR. AVERY, AS A NON-SETTLING DEFENDANT, IS ENTITLED TO A REDUCTION IN JUDGMENT BY THE ENTIRE AMOUNT PAID BY THE SETTLING CO-DEFENDANT, ST. MARY'S.**

#### **A. Standard of Review**

Whether the jury award is subject to a setoff for the earlier settlement of a co-defendant is a legal question that is reviewed *de novo*. *Velez v Tuma*, 492 Mich 1, 10; 821 NW2d 432 (2012); *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008).

#### **B. Analysis**

In a medical malpractice case involving joint and several liability, a non-settling defendant is entitled to a reduction of the final judgment rendered against it by the entire amount of a co-defendant's settlement. *Velez v Tuma*, 492 Mich 1; 821 NW2d 432 (2012). In this case the Greers settled their claims against St. Mary's for \$600,000. Dr. Avery went to trial and a final judgment was entered against her. Dr. Avery is entitled to a reduction of the judgment against her in the amount of \$600,000.

The common-law rule regarding settlement setoff is "that where a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against a non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount." See *Markley v Oak Health Care*, 255 Mich App 245, 250; 660 NW2d 344 (2003), quoting *Thick v Lapeer Metal Products*, 419 Mich 342, 348 n 1; 353 NW2d 464 (1984) and citing *Larabell v Schuknect*, 309 Mich 419, 423; 14 NW2d 50 (1944); *Velez v Tuma*, *supra*. "The common-law

rule of setoff is predicated on the principle that a plaintiff is entitled to only one recovery for his injury.” *Markley*, at 250 (internal citations omitted).

The Restatement (Second) of Torts has also codified the common-law setoff rule:

A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment.

Restatement (Second) of Torts §§ 885(3)(1979).

The Michigan Legislature codified this common-law setoff rule at MCL 600.2925d(B), but subsequently repealed the setoff language after tort reform legislation abolished joint and several liability in most cases. MCL 600.2956. However, in medical malpractice actions, joint and several liability still remains. MCL 600.6304(6). MCL 600.6304 provides, in pertinent part:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

- (a) The total amount of each plaintiff's damages.
- (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

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- (6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

- (a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1).
- (b) If the plaintiff is determined to have fault under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in section 5838a(1), according to their percentage of any uncollectible amount that exceeds that party's percentage of fault as determined under subsection (1). The party whose liability is reallocated continues to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

MCL 600.6304 (emphasis added).

At trial, there was no claim that the Greers were comparatively negligent, the court did not ask the jury to assign fault to the Greers, and the jury did not assign any fault to the Greers.

In *Velez, supra*, this Court addressed the continued existence of the common-law setoff rule, and its interplay with the non-economic damage cap of MCL 600.1483. 492 Mich at 5. Myriam Velez sued Dr. Martin Tuma, and a number of hospital co-defendants for medical malpractice. *Id.* at 7. She settled her claims against the hospitals for \$195,000, and later filed a new complaint against Dr. Tuma. *Id.* The jury found Dr. Tuma negligent, and returned a verdict in Velez's favor for \$124,831.86 in economic damages and \$1.4 million in non-economic damages for a total verdict of \$1,524,831.86. *Id.* The circuit court then applied a set off of \$195,000 to the jury's unadjusted verdict of \$1,524,831.86 rather than the final judgment. The trial court reduced the economic damages to zero as a result of collateral source payments,

reduced the remaining non-economic damages to the amount of the statutory cap, and entered a judgment of \$394,200. *Id.* The Court of Appeals affirmed this decision. *Id.*

This Court granted the parties leave to determine whether the common-law right to setoff in medical malpractice actions was applicable, and if so, how to apply it to a jury's verdict in light of statutory damage caps. *Id.* at 10. This Court held, "when joint and several liability principles apply in medical malpractice cases, *any* settlement must be set off from the final judgment after application of the non-economic damages cap and the collateral source rule." *Id.* at 26 (emphasis added). This Court reaffirmed the Court of Appeals' decision in *Markley v Oak Health Care Investors of Coldwater, Inc.*, 255 Mich App 245; 660 NW2d 344 (2003), and remanded the case to the circuit court for entry of an order reducing the plaintiffs' adjusted verdict of \$394,200 by \$195,000. *Velez, supra* at 6, 16, 27.

The Court of Appeals in *Markley v Oak Health Care, supra*, also examined the application of the common-law rule of setoff in a situation where multiple tortfeasors caused injuries to a plaintiff. Ms. Markley sued Community Health Center (Community) for medical malpractice after she experienced a number of significant medical problems due to Community's alleged negligence. She was admitted to a nursing home owned and operated by Oak Health Care Investors (OHC) as a result of her health problems. Separately, Markley's estate sued OHC after Markley died alleging negligence and wrongful death against OHC. *Id.* at 248. Her estate settled the suit against Community for \$460,000 and the settlement agreement allocated \$220,000 to the legal theory of wrongful death; the remainder was allocated to Markley's conscious pain and suffering while alive. *Id.* See also *Markley v Community Health Center*,

unpublished, Docket 220494, April 6, 2001. With the case against Community settled, the suit against OHC went to trial.

Following trial on the wrongful death claim against OHC, the jury awarded Markley's estate \$300,000. *Markley*, *supra* at 248. The trial court refused to set off from that amount the \$220,000 settlement with Community because it found the law required an apportionment of fault that was not accomplished because the issue was not before the jury. *Id.* at 249. The Court of Appeals disagreed and reversed the trial court's decision. The *Markley* court recognized that OHC and Community were jointly and severally liable, despite the fact that they were sued separately, because their successive acts of medical malpractice produced a single, indivisible injury. *Id.* at 252. The Court distinguished contribution and allocation of fault from joint and several liability, and recognized with joint and several liability "each tortfeasor is liable for the full amount of damages," and a plaintiff has "every legal right to recover the full amount [of damages] from defendants [OHC]," even if the jury had the opportunity to allocate fault [between OHC and Community]. *Id.* at 254. The Court of Appeals reversed the trial court's decision and remanded the case for reduction of the judgment by the \$220,000 settlement amount. *Id.*

In this case, the Greers' complaint contains one count on behalf of Makenzie and Mr. and Mrs. Greer against Dr. Avery and St. Mary's, jointly and severally. The allegations of negligence are exactly the same against Dr. Avery and St. Mary's. (App 1a, ¶ 34). The Greers alleged that the acts of Dr. Avery and St. Mary's caused their collective injuries. Mrs. Greer claimed she was entitled to lost wages because she had to quit her job to care for Makenzie. (App 1a). Mr. Greer claimed that he was liable for all of Makenzie's past and future medical

expenses and costs of care. (App 1a, ¶ 41). The Greers settled their claims against St. Mary's for \$600,000 (App 17a). There was no claim the Greers were at fault and the jury assigned no fault to the Greers. The total adjusted verdict of the jury against Dr. Avery was \$1,058,825.56.

Unlike the settlement agreement in *Markley, supra*, the Greers' Settlement Agreement did not allocate any proceeds for individual claims or any particular legal theories. The Release and Settlement Agreement was entered into "as full accord, satisfaction and settlement of all claims arising from the incident [the instant malpractice case]." *Id.* The settlement agreement between St. Mary's Hospital and the Greers included a full and complete release of all claims (paragraph 1); for one settlement amount of \$600,000 (paragraph 2), made the Greers responsible for all medical liens (paragraphs 7, 8 & 9), and contained the following language at paragraph 12:

This release contains the entire agreement between the parties hereto and there is absolutely no agreement on the part of any person, firm, corporation or other entity to make any payment or do anything other than as is herein expressly stated.

On March 27, the trial court entered an Order Approving Settlement and Authorizing Personal Representative of Estate to Execute Release and Settlement and Dismissing the Action with Prejudice. (App 20a). The trial court's Order approving the settlement expressly stated:

Now, therefore, it is hereby ordered that the settlement posed by the parties, the terms of which are set forth on the record of this Court is hereby approved, the Court expressly finding that the settlement is in the *best interest of Makenzie Greer*, a minor.

The trial court awarded the Greers taxable costs as the prevailing party on the record as a whole under MCR 2.625. (Docket No. 6). The court denied the request of Dr. Avery to tax costs for the individual claims of Mr. and Mrs. Greer even though the jury awarded them no damages.

(Docket No. 1). If, as the Greers now contend, there were three separate individual claims settled separately, why did the trial court award costs to all of the Greers as the prevailing parties and deny Dr. Avery any costs even though Dr. Avery was successful in defeating the "individual" claims of Mr. and Mrs. Greer? Clearly, the trial court concluded that since the Greers had filed a one count complaint against Dr. Avery and St. Mary's, making exactly the same claims arising out of exactly the same acts, transactions and occurrences, the Greers had prevailed at trial, not Dr. Avery. If there were three separate and distinct plaintiffs with three separate and distinct claims, logically, the court would have awarded the Greers one-third of their costs and Dr. Avery two-thirds of her costs as Makenzie prevailed against Dr. Avery but Mr. and Mrs. Greer did not.

In this case the trial court recognized the right of Dr. Avery to setoff, but applied the setoff rule in an unfounded and illogical way. The trial court postulated that because the \$600,000 paid by St. Mary's was in settlement of claims made by all three Greers, and the only successful claim at trial was Makenzie's, it was appropriate "to allow a set-off in the amount of \$162,058.11 or 1/3 of the settlement amount." First, simple division demonstrates the fallacy of the court's approach. If one-third of the settlement amount with St. Mary's was to be setoff, that amount would be \$200,000, not \$162,058.11. Even though the "Confidential Exhibit A" referred to repeatedly by the Greers is not part of the record, and was not part of the settlement agreement between the Greers and St. Mary's, the Greers acknowledge that from that part of the settlement proceeds that were unilaterally apportioned to Makenzie (allegedly \$200,000), a portion of that money was used to pay medical liens. Greers' Brief on Appeal, p. 10. Presumably, the unilateral apportionment of some of the settlement proceeds to Mr. and Mrs. Greer were also

used to pay medical liens as Mr. Greer made a claim that he was entitled to compensation for the medical expenses incurred by Makenzie. All of these same medical expenses were claimed as damages on behalf of Makenzie, and awarded by the jury. The satisfaction of all of these medical liens was the responsibility of the Greers pursuant to their settlement agreement with St. Mary's. It makes no sense for the trial court to allow a setoff of only \$162,058.11 when all of the medical expenses and liens were to be satisfied by the Greers with the \$600,000 settlement they received from St. Mary's.

More important, this allocation of the St. Mary's settlement amount was not the result of the jury's decision-making, the settlement agreement between the Greers and St. Mary's, or any recognizable legal principle. As this Court in *Velez* made clear, the trial court is not permitted to guess at how a settlement should be allocated. *Velez, supra* at 26. "When joint and several liability principles apply in medical malpractice cases, *any* settlement must be set off from the final judgment . . . ." *Id.* at 26. *Velez* instructed that, "Our holding requires a court to subtract the *entire amount* of the settlement from *whatever damages* remain after applying the relevant statutory adjustments." *Id.* at 23, FN45 (emphasis in original). There is simply no basis in logic or law for the trial court's post-settlement and post-verdict-allocation of the amount of the St. Mary's settlement. The adjusted verdict against Dr. Avery should be offset by the entire \$600,000 paid by St. Mary's in its pre-trial settlement with the Greers.

The settlement agreement between the Greers and St. Mary's was confidential. Dr. Avery was not provided with a copy of the settlement agreement until it was subpoenaed from both the Greers and St. Mary's prior to the hearing on June 7, 2012 regarding Dr. Avery's motion for reduction in judgment. The settlement agreement was produced by St. Mary's for

this hearing. The Greers produced nothing in response to the subpoena. They did not produce the so-called "Confidential Exhibit A" as it was clearly not part of the settlement agreement with St. Mary's. There was no allocation of the settlement amount within the settlement agreement between the Greers and St. Mary's. Though the Greers, on their own, and even with the trial court's acquiescence, may have apportioned the total settlement amount in certain ways which are still not known, in accordance with *Velez, supra*, the entire amount of the settlement should be offset from the judgment against Dr. Avery. The apportionment of the lump sum settlement amount was not part of the settlement agreement between the Greers and St. Mary's. That settlement agreement contained "the entire agreement between the parties" and expressly stated that "there is absolutely no agreement on the part of any person, firm, corporation or other entity to make any payment or do anything other than is herein expressly stated."

The Greers claimed that the same conduct by all defendants caused all of their damages. The Greers consolidated their claims into one cause of action. The jury awarded damages to Makenzie but not to Mr. and Mrs. Greer. By application of the common law right to setoff, Dr. Avery is entitled to a reduction in the judgment against her by the entire \$600,000 settlement between the Greers and St. Mary's. *Velez, supra; Markley, supra*.

**C. The Greers' Arguments as Cross-Appellants**

**1. The Greers Incorrectly State that the Court of Appeals Did Not Recognize That There Were Three Individual Plaintiffs.**

The Court of Appeals in this case relied not only on *Velez*, but the principles of common law setoff set forth in *Markley, supra*, *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW 287 (1928) and *Great Northern Packaging v General Tire*, 154 Mich App 777; 389 NW2d 408

(1986). The Court of Appeals in this case was clearly cognizant of the fact that there were three plaintiffs. At page 5 of its opinion, the Court of Appeals stated:

Plaintiffs brought their complaint against all defendants alleging a single count of malpractice concerning a single discrete incident, the birth of Makenzie. Because any liability of defendants was joint and several, plaintiffs were free to settle with some defendants and proceed to trial against other defendants. *Markley*, 255 Mich App at 251, citing *Verhoeks v Gillivan*, 244 Mich 367, 371; 221 NW2d 287 (1928). But for a single injury, plaintiffs could have only one recovery. *Id.* Plaintiffs might have been able with St. Mary's agreement to apportion the settlement among their separate claims. See, e.g., *Markley*, 255 Mich App at 248 (where a joint tortfeasor's settlement was divided into an amount allocated to wrongful death and an amount allocated to pain and suffering). Plaintiffs here did not do so. Plaintiffs collectively settled **all** their claims against a jointly liable tortfeasor arising out of a single instance of malpractice involving Makenzie's birth for a single undifferentiated lump sum of \$600,000. After trial against the non-settling defendants on all the same claims, a jury determined the value of all plaintiffs' claims. To ensure that plaintiffs are fully but not overly compensated for **all** their claims, the entire St. Mary's settlement must be offset against the amount the jury determined were all plaintiffs' collective damages. *Markley*, 255 Mich App at 250-251. Where there is a recovery "for an injury identical in nature, time and place, that recovery must be deducted from [the plaintiffs'] other award. *Great Northern Packaging*, 154 Mich App at 781.

The Court of Appeals then looked to this Court's decision in *Velez* and found that *Velez* "reinforced" the Court of Appeals' reasoning in this case. The Court of Appeals took to heart the *Velez* Court's admonition that a trial court should not attempt "apportionment of an individual lump sum settlement into partial, severable settlements". In a case like this, where there is a single lump sum settlement, the Court of Appeals recognized by quoting from page 26 of the *Velez* decision that "in instances like the present, in which the composition of the settlement is unknown, circuit courts would be left to guess at how a settlement should be allocated. Requiring circuit courts to engage in this guesswork, from which a range of potential outcomes

could result, unreasonably burdens them with a determination that they are, in the absence of any statutory guidance, ill prepared to make.” Thus, the Court of Appeals in this case concluded:

Similarly, in this case, to avoid speculative apportionments of an undifferentiated lump sum settlement paid by a jointly liable co-defendant to settle more than one plaintiffs’ claim arising from a single alleged incident of malpractice, the entire settlement must offset the entire jury award to all plaintiffs. Further support of this conclusion is found by analogy to application of the non-economic damage cap of MCL 600.1483(1) which provides in part that “the total amount of damages for non-economic loss recoverable by **all plaintiffs**, resulting from the medical malpractice of **all defendants**, shall not exceed” a specified amount with certain exceptions.”

**2. The Greers Argue, Incorrectly, that the Claims against Dr. Avery and St. Mary’s were Different.**

At page 7 of their Brief, the Greers state, again incorrectly, “the claims brought against St. Mary’s differed from those brought against Dr. Avery. . . .” Nothing could be further from the truth, and the Court of Appeals recognized this. The Court of Appeals recognized, as is apparent from ¶ 34 of the Greers’ complaint, that the allegations of negligence and the claims for damages were identical against Dr. Avery and St. Mary’s. The Court of Appeals recognized:

Before trial, St. Mary’s Hospital paid \$600,000 to plaintiffs Elizabeth Greer and Kenneth Greer individually, and as conservator of Makenzie Greer, to settle “any and all claims, demands, damages, actions, causes of action or suits of any kind or nature . . . as a result of an incident which occurred on or about September 28, 2008, including the subsequent medical treatment provided, Makenzie Greer, because of this incident.” The receipt of the payment was a “full accord, satisfaction and settlement of **all claims** arising from the incident.” The settlement agreement did not articulate in any way how the lump sum payment should be assigned to any particular plaintiff or any particular claim or legal theory. Rather, the settlement payment was for “any and all claims” that all plaintiffs may have arising from the incident that “occurred on or about September 28, 2008” and included “the subsequent medical treatment” of Makenzie . . . . In sum, the settlement was a lump sum payment by an alleged jointly and severally liable tortfeasor to settle all claims of all plaintiffs arising out of the malpractice incident described in plaintiffs’ complaint.

On page 7 of their Brief, the Greers quote a statement made by the trial court in denying Dr. Avery's motion for reconsideration, presumably in an effort to demonstrate that the trial court had some basis for ignoring the clear language of the settlement agreement between the Greers and St. Mary's and ignoring the fact that the claims of negligence against Dr. Avery and St. Mary's, and the claimed damages as a result of that negligence, were exactly the same. The quotation from the trial court reads:

The court notes that while the mother and father received a "no cause" on their claims against the plaintiff [sic] doctor, in the court's opinion, it is more likely than not that such would not have been the case in the parents' claim against the hospital. Multiple times during the trial, the parents provided specific and detailed testimony of how they had advised agents of the hospital that the delivery was **in extremis** and it was suggested the hospital and its agents did not act properly.

What this quote demonstrates is that the trial court failed to grasp, even on reconsideration, the nature of the individual claims of "the mother and father", Mrs. Greer and Mr. Greer. The basis for Mrs. Greer's individual claim was that Dr. Avery injured her ureter when Dr. Avery ultimately performed the Caesarean section. Mr. Greer's individual claim was for loss of consortium he sustained because of the injury to Mrs. Greer's ureter, and also for all of Makenzie's medical expenses which were part of the damages awarded by the jury. Dr. Avery was the one that performed the Caesarean section, but the Greers made the same claims of negligence regarding the injury to the ureter against Dr. Avery and St. Mary's. The jury awarded no damages to Mr. and Mrs. Greer regarding their claims. Since Dr. Avery was the one who performed the Caesarean section, it would have been impossible for the jury to have awarded damages only against St. Mary's on Mr. and Mrs. Greer's individual claims.

The “specific and detailed testimony” about the “delivery” being “*in extremis*” did not in any way deal with the claim that Mrs. Greer suffered an injury to her ureter during the Caesarean section. Rather this testimony went to the claims the Greers made against all defendants, Dr. Avery and St. Mary’s, that the Caesarean section should have been done earlier to avoid injury to Makenzie. The quotation from the trial court when it decided the motion for reconsideration may be predictive of the fact that the trial court would not properly apply the setoff rule, but it certainly does not provide a logical or legally sustainable basis for the trial court’s application of the setoff rule. As the Court of Appeals in this case noted:

Finally, any necessary apportionment of the St. Mary’s settlement among the three plaintiffs should be made in accordance with the factfinder’s determination. The jury determined that Mr. Greer and Mrs. Greer’s claims were valued at zero. Accordingly, if it were possible to apportion the undifferentiated lump sum settlement, Mr. and Mrs. Greer’s portion should be valued at zero. Doing so results in setting off the entire St. Mary’s settlement from damages that remain after applying the relevant statutory adjustments to arrive at the final judgment in favor of Makenzie’s conservator.

**3. The Greers Acknowledge that the Apportionment of the Settlement Amount is Not Part of the Settlement Agreement Between the Greers and St. Mary’s and is Not within the Record.**

At page 6 of their application, the Greers acknowledge that “the specific apportionment of the \$600,000 settlement was not to be found in the record.” The Greers explain this by asserting that “the settlement with St. Mary’s was confidential.” However, the settlement agreement between the Greers and St. Mary’s is part of the record and makes no apportionment whatsoever as between any individual claims or any individual legal theories. Though the

Greers may have, on their own, and even with the acquiescence of the trial court,<sup>1</sup> decided themselves to apportion the settlement amount, that apportionment was not a part of the agreement between the Greers and St. Mary's, and the Court of Appeals was well aware of this. The Court of Appeals noted:

. . . [W]e can find no basis in the release and settlement agreement between plaintiffs and St. Mary's Hospital or the jury's verdict to allocate any portion of the St. Mary's payment to injuries other than those of Makenzie Greer, nor do we have the ability to alter the settlement agreement, which is, of course, a contract.

Plaintiffs might have been able with St. Mary's agreement to apportion the settlement among their separate claims . . . . Plaintiffs here did not do so.

Plaintiffs collectively settled all their claims against a jointly liable tortfeasor arising out of a single instance of malpractice involving Makenzie's birth for a single undifferentiated lump sum of \$600,000.

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<sup>1</sup> On March 27, 2012, the trial court entered two orders. One was the Order Approving Settlement and Authorizing Personal Representative of the Estate to Execute Release and Settlement Agreement and Dismissing the Action with Prejudice. This Order approved the contract between the Greers and St. Mary's, the Release and Settlement Agreement, which called for a lump sum, unapportioned payment of \$600,000 to the Greers by St. Mary's in exchange for a full and final release of all claims against St. Mary's. The claims against St. Mary's were precisely the same claims that were made against Dr. Avery. The contract between the Greers and St. Mary's is a part of the record.

The second order entered by the trial court on March 27, 2012 was an order approving the Greers' unilateral apportionment of settlement proceeds; an apportionment which was not part of the contract between the Greers and St. Mary's and which the Greers admit, even today, is not part of the record. Rather, the unilateral apportionment which, apparently, appears in a Confidential Exhibit A, was not presented to the Court of Appeals and has not been presented to this Court. It was not presented either in response to Dr. Avery's subpoena for all relevant settlement documents when she filed her motion for reduction in judgment with the trial court. Since the Greers' unilateral and confidential apportionment of the lump sum settlement amount is not part of the record, and has never been part of the record, the Greers' unilateral apportionment cannot serve as a basis for appellate relief. *Walters v Nadell*, 481 Mich 377 (2008); *Sherry v East Suburban Football League*, 292 Mich App 23; 807 NW2d 859 (2011). In any event, the Greers' unilateral apportionment is not a part of the settlement contract between the Greers and St. Mary's, as the Court of Appeals recognized.

Thus, the Court of Appeals focused on the agreement between the Greers and St. Mary's which was a part of the record, not a confidential allocation of the settlement amount decided upon by the Greers alone which was not a part of the record. The concurring opinion of Judge Krause in this case recognizes that the trial court "was not permitted to" make an allocation of the lump sum settlement amount between the Greers and St. Mary's "for the simple reason that in making the attempt, the trial court essentially rewrote the parties' settlement agreement." Judge Krause went on to state:

Because the agreement did not itself allocate the settlement among the injuries, it would be impossible for any court to do so without drafting into the parties' contract something that the parties themselves did not include. Absent extreme and unusual circumstances, courts may not do so; the parties are of necessity bound to their contract. Had the contract specified a percentage or dollar value allocated to Makenzie's injuries, it would have been proper for the court to set off only that amount. Because the contract did not do so, the courts cannot rescue parties from their own voluntary agreements. Consequently, I conclude that the court had no choice but to set off the entire amount, and it erred by failing to do so.

#### **RELIEF REQUESTED**

For the reasons stated, Dr. Avery requests that this Court affirm the Court of Appeals decision insofar as it granted Dr. Avery a setoff in the amount of \$600,000.

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